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THE AMERICANS WITH DISABILITIES ACT AND THE AGING ATHLETE AFTER *CASEY MARTIN*

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In 1990, an overwhelming bipartisan vote in the U.S. Congress[1] enacted the Americans with Disabilities Act (ADA),[2] a strong antidiscrimination statement tracing its origins from the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion, national origin and sex.[3] The ADA prohibits discrimination on the basis of disability in employment,[4] government programs and facilities,[5] and public accommodations.[6] It calls for many types of accommodations[7] for people with disabilities to allow them to participate in the mainstream of life[8] with non-disabled people.

In 2001, the Supreme Court took a controversial step in applying the ADA to professional sports participants in *PGA Tour, Inc. v. Martin*,[9] ruling that disabled golfer Casey Martin is permitted to use a golf cart to play in PGA Tour tournaments despite prohibiting rules, as a reasonable

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1. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 18-27, 27 n.2 and accompanying text (The Senate voted 93.8%, and the House 93.1%, in favor of the ADA.).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 1, 104 Stat. 327 (1990) (codified as amended in 42 U.S.C. §§ 12101-12213).

3. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 5 U.S.C. §§ 2204(32), 2205; 28 U.S.C. §§ 1447(d); and 42 U.S.C. §§ 1975a-1975d, 1981-1997, 2000a-2000h).

4. 42 U.S.C. §§ 12111-12117 (1994) [hereinafter Title I]. *See also* 29 C.F.R. §§ 1630.1-1630.16 (2001).

5. *Id.* §§ 12131-12165 (1994) [hereinafter Title II]. *See also* 28 C.F.R. §§ 35.101-35.999 (2001).

6. *Id.* §§ 12181-12189 (1994) [hereinafter Title III]. *See also* 28 C.F.R. §§ 36.101-36.608 (2001).

7. Accommodations to enable a person with a disability to participate generally include auxiliary aids and services; physical access to facilities; job restructuring; modifications of examinations; and modifications of programs, practices, and procedures.

8. Under Title III, for example, discrimination includes denial of participation in or benefit from goods or services, etc., participation of unequal benefit, or providing a separate benefit. 28 C.F.R. § 36.202(a)-(c). *See infra* notes 35-58 and accompanying text.

9. 121 S. Ct. 1879 (2001). PGA is the frequently referred to acronym for Professional Golfers' Association.

accommodation that a person with a disability may require by law from a public accommodation.[10] Many sports lovers were outraged[11] for reasons that seem to reflect two related values: The sanctity of sports rules for the sake of tradition and gamesmanship,[12] and the rejection of this antidiscrimination law enforced by litigation as the means to determine exceptions to sports rules.[13] Some assert that the *Martin* opinion is lim-

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10. 29 C.F.R. § 36.104.

> *Facility* means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located. . . . *Place of public accommodation* means a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories [twelve types of places and services sites follow].

Id.

11. *See, e.g.*, David Broder, *Denigrated Hit – What if Ruling is Applied to Baseball?*, MILWAUKEE J. SENTINEL, June 3, 2001, at J3 (asserting that the designated hitter rule of the American League might, under the Casey Martin ruling, be forced upon the National League by "some smart lawyer" for an aging "slugger" who can no longer run the bases). *See also* Paul M. Anderson, *Spoiling a Good Walk: Does the ADA Change the Rules of Sport?*, 1 VA. J. SPORTS & L. 44, 85 (1999) (golf organizations are "loathe to admit that the ADA does apply" even after Martin and a similar case, *Olinger v. United States. Golf Ass'n*, 205 F.3d 1001 (7th Cir. 1998), *vacated by*, 121 S. Ct. 2212 (2001)); *See infra* note 29 and accompanying text.

12. *See, e.g.*, Thomas A. Bowden, *Shame on Casey Martin*, AYN RAND INSTITUTE (Jan. 11, 2001), *at* http://www.aynrand.org/medialink/martin_case.shtml (last visited Oct. 15, 2001) (analogizing the *Martin* claim to Tonya Harding's clubbing of Nancy Kerrigan's knee prior to the winter Olympics of 1994, and asserting that the PGA should have an absolute right to set its own rules, and that spectators should be able to see only the ablest athletes).

Many letters to the editor reflected the intent to exclude persons with disabilities. *See, e.g.*, Wes Johnson, *Letters*, ATLANTA J.-CONST., June 1, 2001, at 23A ("Every one of [the Supreme Court justices] missed the point. It is not for Casey Martin, you, or me to decide whether he can ride in a cart in a PGA event. We can debate how we would decide if we ran the PGA or what we would prefer the PGA do, but the federal government should have no jurisdiction over the rules of play in a public or private business." The writer finds the fault to lie with the Congress, the ADA, and the courts that are not serving to check and balance each others' powers as intended by the framers.); *Capital Gang* (CNN television broadcast, June 2, 2001) ("[T]he kind of rules we want the court looking at are not the rules of golf."); Mary Bugeia, *Has Court Leveled Golf's Playing Field*, THE DETROIT NEWS, June 11, 2001, at 8 (asserting that walking is an aspect of the game, and that the rules of the Senior Golf Tournament allow the option not to walk to adjust for needs of older players. The author observes that she walked the course while Gary Player golfed, and observed that he sometimes had to lie down on the grass to ease back pain. However, she observes, he did not ask for changes in the rules of the game.). One wonders what Gary Player might have done if the rules prohibited lying down on the course.

13. *See, e.g.*, Rick Telander, *Sports Court Trouble: Will Fallout from Casey Martin Ruling Disable Our Games?*, CHICAGO SUN-TIMES, May 30, 2001, at 94 (asking whether sports rules more accommodating to the handicapped will clog golf courses, who will pay the costs, and whether sports organizations will shut down rather than pay or change). Asserting that such results arise from fear of liability, the author notes the absence of "large slides, big swings, . . . high-speed merry-go-rounds" from playgrounds as results of fear of liability. *Id.*

ited to its peculiar facts, which include PGA and other golf rules that allow the use of carts in most tournaments and qualifying rounds, and Casey Martin's widely acknowledged and severe disability,[14] while others responded positively to the application of non-discrimination principles to a human endeavor of a high order.[15]

The changes in progress in law and society as illustrated and advanced in the *Martin* decision have important implications for the future, as a growing proportion of athletes are persons with disabilities. Specifically, numbered among disabled competitors over the next thirty years will be many members of the babyboomer age cohort,[16] as the oldest among them begins to reach the traditional retirement age of sixty-five in 2010, and to accumulate the chronic disabilities often attending later life.[17] This age group, far larger in number than those born before them in the Great Depression and World War II years, or in the contraceptive-conscious late 1960s and 1970s, has been identified for a number of traits that seem to arise from their sheer numbers (which caused a nationwide industry of elementary school building in the 1950s and was a significant factor in the youth-oriented culture of the late 1960s and 1970s) and the intense interest their more mature and indulgent parents took in their interests and wishes.[18] Some assert 'boomers' show a self-interested refusal to "act their age;"[19] that 'boomers' assert, perhaps due to sheer numbers in the population, revised views of the course of life and its

14. Tom Jackson, *Supreme Court's Ruling Means Golf is No Sovereign Nation*, TAMPA TRIB., June 3, 2001, at 9 (challenging the PGA's view that the Martin ruling fits no other facts, while noting that it is possible for quarterbacks who fear brain damage to bring suit under the ADA to require additional blocking help and challenge the eleven player squad as "capricious"). *But see* John Feinstein, *Ruling Could Create Big Lines for Carts at the Golf Course*, MILWAUKEE J. SENTINEL, June 2, 2001, at 13A (citing sports players with debilitating conditions who might require some favorable treatment, including "a wheelchair-bound three point shooter [who] would have the right under the ADA to play in the National Basketball Association if someone wanted to use him").

15. *See, e.g.*, Tom Kensler, *Golf Notes: Martin is Welcome in Colorado*, DENVER POST, June 7, 2001, at D12 (noting that the Colorado Open allows the use of carts by all players and that players with disabilities can be invited provided only that they enhance the field).

16. Babyboomers are variously described as those born between 1946 and 1964, or 1947 and 1965, many of whom are born to returning servicemen and their spouses as they establish households and begin families delayed by the separation dictated by the work of war.

17. Alison Barnes, *Envisioning a Future for Age and Disability Discrimination*, 35 U. MICH. J.L. REFORM (forthcoming 2002).

18. Among defining works on the babyboom generation are LANDON Y. JONES, GREAT EXPECTATIONS: AMERICA AND THE BABY BOOM GENERATION (1980) and JERRY GERBER ET AL., LIFETRENDS: THE FUTURE OF BABY BOOMERS AND OTHER AGING AMERICANS (1989).

19. *See generally* LANDON Y. JONES, GREAT EXPECTATIONS: AMERICA AND THE BABY BOOM GENERATION (1980); JERRY GERBER ET AL., LIFETRENDS: THE FUTURE OF BABY BOOMERS AND OTHER AGING AMERICANS (1989).

traditional obligations.[20] Also, babyboomers often compete fiercely, a trait learned in order to succeed on the crowded life stage shared with their peers, both in business and in the youth-pursuing venues of sport.[21]

These generalizations, while true of no specific 'boomer,' suggest that this age cohort will seek to hold its place in the mainstream rather than choose genteel retirement from activities pursued throughout a lifetime. Since many engage in competitive sports either as daily routine or vacation recreation, babyboomers are likely to seek to continue their sports participation despite accumulating disabilities.[22]

The Court's decision in favor of Casey Martin and the reaction from athletes, commentators and the public, calls for examination of the ADA's role vis-à-vis sporting rules and people with disabilities who wish to compete.[23] This essay explores the possible implications of the ADA and *Martin* in the future of sports, particularly during the extended old age of the babyboomers. First, it will review the facts and some implications of the *Martin* decision. Second, it will discuss the ADA in the context of other anti-discrimination law, and propose reasons that regulated parties, including sports organizations, may be especially skeptical about the requirement for accommodation of people with disabilities. The discussion next moves to the likely disabilities and interests of the babyboomers as older athletes. Fourth, the article reviews ways in which sports already take into account differences between competitors in order to create circumstances for fair competition between unlike persons, examples of the voluntary accommodation of disabled athletes that tends to show the nature of non-fundamental changes in sports rules,

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20. Even recent harshly critical assessment of babyboomer traits, written by 'boomer authors, involves the 'boomers' self-absorption, rather than moving on in the traditional course of past generations. *See, e.g.*, Alex Kuczynski, *A Caustic Look In the Mirror From Boomers*, N.Y. TIMES, Aug. 6, 2001, at C1 (reviewing authors who assert that 'boomers are misguided in their self-regard and self-involvement). Indeed, the self-loathing of the babyboomer authors who are reviewed might be yet another form of self-regard.

21. *Id.* Of course, more young adults also survive trauma and disease that would in an earlier time have been fatal, and often have lifelong chronic conditions that limit the ways in which they can perform major life activities. Their commitment to athletic and other competition is beyond the scope of this article.

22. *See infra* notes 113-144 and accompanying text.

23. In order to draw attention to the fleeting nature of non-disabled status and affirm the perception that disability is a normal state varying primarily in terms of degree, disability advocates use the acronym TABs for "temporarily able-bodied" persons. For a scathing interpretation of the use of the term, see Bowden, *supra* note 12, *at* http://www.aynrand.org/medialink/martin_case.shtml (asserting that the ADA was "designed by disability advocates who resentfully describe healthy people as 'temporarily abled,'" preventing employers from hiring able persons, firing disabled persons, and incurring costs for ramps and sign language interpreters).

and the possible evolution of sports and society to allow principled accommodation of athletes with disabilities, in keeping with the letter and spirit of the ADA.

I. THE LEGEND OF *CASEY MARTIN*

Casey Martin is the first plaintiff to use the ADA to assert the right to an accommodation to allow him to compete in professional golf.[24] In *Martin v. PGA Tour, Inc.*[25] Martin had won a preliminary injunction from the district court for the 2000 PGA Tournament allowing him to use a cart in the third stage of qualifying rounds.[26] The PGA, in response to the order, allowed all participants in the round to use carts and about twenty did so. The order also allowed Martin to use a cart on two Nike Tour tournaments, one of which he won.[27] The PGA sought a summary judgment from the magistrate judge in the final disposition.[28] The judge considered a number of issues later addressed by the Supreme Court, including the PGA's status as a private club and whether the PGA is an employer or a public accommodation with regard to Martin. The magistrate held that the PGA is a public accommodation and that the use of a cart was a reasonable accommodation for Casey Martin. The PGA appealed for Supreme Court review.[29]

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24. For a review of athlete accommodation cases prior to *Martin*, especially college rule changes to allow extended eligibility for athletes with learning disabilities, see Anderson, *supra* note 11, at 51-73. The PGA has included golfers with physical impairments in tournaments in the past. Notably, Ed Furgol won the U.S. Open without accommodation for a withered left arm, which might have made him a person with a disability under the ADA. In 1987, golfers Charlie Owens and Lee Elder apparently were first to ask the PGA for permission to use a cart. Both were denied. *Id.* at 76-77.

25. 984 F. Supp. 1320 (D. Or. 1998), *aff'd*, 204 F.3d 994 (9th Cir. 2000), *aff'd*, 121 S. Ct. 1879 (2001).

26. *Id.* at 1322.

27. Anderson, *supra* note 11, at 233-35 (citing Cameron Morfit, *Winning a la Cart; While Preparing to Fight the Tour for the Right to Ride, Casey Martin Won the Nike Opener*, SPORTS ILLUSTRATED, Jan. 19, 1998, at G6).

28. *Martin*, 984 F. Supp. at 1322. For commentary, see also Christopher M. Parent, Note, *Martin v. PGA Tour: A Misapplication of the Americans with Disabilities Act*, 26 J. LEGIS. 123 (2000).

29. Two other professional golfers have sought ADA relief. Ford Olinger, who was denied permission of the United States Golf Association to use a cart, won a temporary restraining order allowing him to use a cart to compete in a qualifying round for the 1998 U.S. Open. When he failed to qualify, he sought and was denied USGA permission to use a cart in the 1999 qualifying rounds. Olinger sued in the federal district court, which ruled that a cart can give an advantage over players without carts, and thus is a fundamental change to the game that cannot be imposed on the USGA. Olinger v. United States Golf Ass'n, 55 F. Supp. 2d 926, 937 (N.D. Ind. 1999), *aff'd*, 205 F.3d 1001 (7th Cir. 2000), *vacated by* 121 S. Ct. 2212 (2001). The Seventh Circuit, in an opinion full of golf lore but short on legal reasoning, ac-

The issues of the case are examined here in the order in which the arguments typically proceed, beginning with the plaintiff's *prima facie* case, through the defendant's denial of jurisdiction, to the shift in the burden of proof to the defendant to show non-discriminatory reasons for its action. The ADA requires first that a plaintiff be a person with a disability, defined in pertinent part as one who has "a physical or mental impairment that substantially limits one or more of the individual's major life activities."[30] Though a point of contention that resulted in new Supreme Court interpretation in 2000,[31] Martin's disability was not questioned by the PGA or by the Court. His pain and risk from walking with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart, has been well documented. Thus, Martin avoided the hostile scrutiny that preoccupied the Court in other recent cases.

A plaintiff next must show that he is qualified to participate in the benefit or sought-after activity. Martin showed he was qualified by participating successfully in the required preliminary play, termed Q-school.[32] However, a legal question remained regarding what legally protected role Martin qualified for. Here, the Court had to choose between Title I of the ADA, which prohibits discrimination on the basis of disability by an employer; Title III, which prohibits discrimination by the owners and operators of public accommodations; and non-suit because the PGA is neither of these types of entities.[33]

The Court chose the literal lack of employer-employee relations between Martin as a pro golfer and the PGA. In doing so, it emphasized

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knowledged the validity of Olinger's arguments on appeal but stated that it was not necessary for the USGA to evaluate Olinger's request to waive the walking rule. *See generally Olinger*, 205 F.3d 1001. Rather, the decision and its process was left to the USGA. *Id.* at 1007.

The lack of clarity in the reasoning leaves room for doubt that there was a split in the Circuit Courts. On the similarities and differences in the *Martin* and *Olinger* circuit court opinions, see Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 2000 BYU L. REV. 1489, 1520-24.

The other known suit was brought by JaRo Jones, who sought to use a cart in the Senior Open qualifying rounds. Jones has the effects of polio. *Id.* at 1531 n.180 (citing Jim Vertuno, *Yahoo! Sports Headlines*, *available at* http://dailynews.yahoo.com/h/ap/20000501/sp/glf_disabled_lawsuit-1.html (last visited May 1, 2000)).

30. 42 U.S.C. § 12102(2)(A).

31. *See infra* note 134 and accompanying text.

32. *Martin*, 121 S. Ct. at 1884 nn.1-2 (describing ways of qualifying, including Q-school).

33. 42 U.S.C. § 12182(a). The statute prohibits denial of participation through contractual and other business relations and denial of opportunity to benefit from the public accommodation's goods, services, facilities, privileges, advantages, or accommodations; participation of unequal benefit; and providing a separate benefit unless necessary to provide the person with a disability with goods, services, or opportunities as effective as those provided to others.

all the ways the golfer's relationship with the PGA differs from employment, in that he was not required to participate in any particular tournament, only to play in a minimum number of them.[34]

The Court chose instead, following the Ninth Circuit, to characterize the PGA as a public accommodation governed under ADA Title III. Public accommodations are defined in ADA regulation in an extensive but nonexclusive list of types of private entities providing goods and services to the public.[35] The list includes a golf course,[36] but of course the PGA is not and does not operate the golf courses at which its tournaments are held. Thus, relying on Title III in *Martin* poses definitional problems, as did Title I.

In deciding the PGA is a public accommodation, the Court rejected the organization's argument that it is a private club subject to an exception from compliance with the ADA.[37] Rather, it adopted the reasoning of the magistrate judge below that the PGA should be considered a commercial enterprise, and that a portion of a golf course – specifically, the areas of play – could not be an exception to the characterization of the course[38] because such a distinction would open the door to intentional discrimination. The type of public accommodation specifically recognized by the ADA that applies to the PGA is "a place of exhibition or entertainment."[39] The reasoning requires that professional golfers be the "clients and customers" of the PGA. The PGA argued, in contrast, that the golfers are producers of the entertainment, like actors in a theater production.[40]

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34. An excellent reason to avoid Title I in *Martin* is the EEOC's view of the range of jobs available to a prospective plaintiff. In 29 C.F.R. § 1630.2(j)(3)(i), the EEOC provides that a person is substantially limited in the activity of work if "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.* Under this standard, Casey Martin might be considered qualified for many jobs that do not require any significant walking, and might be readily hireable when taking into account the factors the EEOC would consider. *Id.* § 1630.2(j)(3)(ii).

35. 28 C.F.R. § 36.104. "Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation." *Id.*

36. *Id.*

37. *Martin*, 121 S. Ct. at 1886 n.10. *See also* 42 U.S.C. § 12187; 28 C.F.R. § 36.104 (private club under the ADA is defined by the Civil Rights Act of 1964 and is exempt from Title III requirements).

38. *Martin*, 121 S. Ct. at 1886.

39. *Id.* at 1891 (citing 42 U.S.C. § 12181(7)(c)).

40. *Id.* The argument, of course, specifically suggests that Martin would have only a Title I employee's claim, the PGA's preferred view.

The Court based its conclusion on the observation that any member of the public who competes successfully in qualifying rounds or Q-school, and provides two references, can proceed without further screening to compete in PGA tournaments. The PGA's reasoning that it had spectators as customers who could be distinguished from the players did not preclude the players from being clients or customers as well.

Once Martin establishes his *prima facie* case – that he is a qualified person with a disability subject to the protection of the ADA and has suffered from negative action such as exclusion or failure to reasonably accommodate[41] a disability – the defendant PGA must offer nondiscriminatory reasons for its apparently prohibited action. The PGA as a public accommodation is required under the ADA to avoid imposing eligibility criteria that tend to screen out a person with a disability from full and equal enjoyment of its goods or services unless necessary in order to provide the goods or services; to make reasonable modifications in policies and practices when necessary to afford the goods or services to a person with a disability, unless the modification would fundamentally alter the nature of the goods or services; and to ensure that no person with a disability is excluded because of the absence of auxiliary aids and services, unless such changes would fundamentally alter the nature of the goods or services or impose an undue burden on the public accommodation.[42]

Since the policy of excluding carts at the final stage of PGA competition is not clearly necessary to enable play, and the provision of widely available golf carts to prevent Martin from being excluded is not an undue burden,[43] the strongest argument is that the use of carts is a funda-

41. The nature of a reasonable accommodation sought by an ADA plaintiff is frequently at the core of litigation, especially in long term relationships such as employment and Martin's relationship with the PGA. There is no issue here since only the rule prevents the use of a single cart which, of course, is readily available and no undue burden to the PGA. Waterstone, *supra* note 29, at 1521 (clarifying that the plaintiff faces only the relatively light burden of showing that an accommodation is "reasonable in a general sense," with more required later if the defendant fails to show that the accommodation is a fundamental change or an undue burden) (citing Johnson v. Gambrinus Co./Spotzl Brewery, 116 F.3d 1052 (5th Cir. 1997)).

42. 42 U.S.C. § 12182(b)(2)(A)(i-iii). The difference in the requirements with regard to the three "specific prohibitions" in this section are not clear and may occasionally be significant. That is, eligibility criteria cannot tend to screen out unless *necessary*, policies and procedures must be altered unless it would result in a *fundamental alteration* of the goods, and steps must be taken to avoid exclusion or segregation because of absence of auxiliary aids and services unless remedial steps would fundamentally alter the nature of the goods or services *or result in undue burden*. One source of confusion is the fact that a requested accommodation might fall into more than one category.

43. 28 C.F.R § 36.104.

mental alteration of the game of golf at the level of tournament play in which the rules exclude carts. Thus, the PGA did not dispute that the use of a cart by Casey Martin was a reasonable accommodation.[44] It asserted instead in response to the demand for the reasonable accommodation of a cart that such a change in the rule would be a fundamental alteration to the game of golf.[45]

Seeking the fundamental or essential aspects of the game of golf, the Court considered three applicable sets of rules regarding tour events: the "Rules of Golf," the "Conditions of Competition and Local Rules" governing PGA professional tours, and "Notices to Competitors" which are issued for particular events. The Rules of Golf do not prohibit the use of carts.[46] The "Conditions" (also called the "hard card") require PGA Tour golfers to walk unless permitted to ride, and carts are allowed for preliminary rounds, but not during extensive tournament rounds.[47] Since 1997, carts are not permitted in the final round of the qualifying Q-school, in order to replicate as closely as possible the conditions of tournament play. The hard card permits the use of carts throughout the Senior PGA Tour for golfers fifty and older.[48]

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(1) Undue burden means significant difficulty or expense. In determining whether an action would result in an undue burden, factors to be considered include –
(2) The nature and cost of the action needed under this part;
(3) The overall financial resources of the site or sites involved in the action; the number of persons employed by the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site;
(4) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity;
(5) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and
(6) If applicable, the type of operation or operations, of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.

Id.

44. *Martin*, 121 S. Ct. at 1893.

45. *Id.*

46. An appendix suggests that, if desired, players might be required to walk the course. *Martin*, 121 S. Ct. at 1884-85.

47. Interestingly, the USGA Senior Tour apparently restricts the use of carts during the qualifying rounds but allows them in tournaments. Waterstone, *supra* note 29, at 1531. The reversal from the PGA rule suggests either that the rules are indeed arbitrary, or that a significant purpose is the pace of Senior Tour play. That is, senior golfers might be required to walk in qualifying rounds to show they are in generally good physical condition, but can use carts in the tournament because their walking might slow the pace of play.

48. *Martin*, 121 S. Ct. at 1885.

While some intention to regulate the use of carts was apparent, the Court found the actual practices and reasons to lack the coherence that might have made the exclusion of carts fundamental to the game when played at the highest professional tournament level. The Court focused first on the reasons advanced by the PGA for excluding carts. It asserted that "the key is to have everyone tee off on the first hole under exactly the same conditions and all of them be tested over that 72-hole event under the conditions that exist during those four days of the event."[49] On the contrary, the Court pointed out, it is impossible to assure the same conditions while teeing off and playing on different holes, because of changes in the winds and weather.[50] The Court considered pure chance to be at least as likely to affect the outcome of the game.

The other significant reason advanced by the PGA to prohibit carts is in order to introduce a fatigue factor into final tournament play.[51] Such golf legends as Arnold Palmer and Jack Nicklaus testified, emphasizing the importance of fatigue to concentration and accuracy in shot-making. Particular golf tournaments in 1950 and 1964 with physically arduous conditions were cited from *Olinger v. United States Golf Association*.[52]

The Court gathered contrary information and testimony from the record. A professor of physiology and expert on fatigue testified that the actual expenditure of energy in walking the course was modest, and that psychological factors are more likely to affect tournament play.[53] The behavior of golfers given the option of using a cart or walking was very significant. Senior Tour members generally declined to use carts[54] as did Q-School members given permission to ride because of Martin's injunction.[55] Tournament level golfers testified that walking is preferable in order to "keep in rhythm, stay warmer when it is chilly, and develop a better sense of the elements and the course."[56]

The PGA could not argue against Martin's use of a cart on the basis of the risk of unmanageable numbers of others seeking the same exception. In three years since Martin requested a cart, no one else had sued the PGA, and only two golfers had sued the United States Golf Associa-

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49. *Id.* (citing UNITED STATES GOLF ASS'N & ANCIENT GOLF CLUB OF SCOTLAND, RULES OF GOLF, at App. 192 (2000) [hereinafter RULES OF GOLF]).

50. *Id.* at 1895.

51. *Id.* at 1887.

52. 205 F.3d 1001, 1006-07.

53. *Martin*, 121 S. Ct. at 1896.

54. *Id.* at 1896 n.49.

55. *Id.* at 1896.

56. *Id.*

tion (USGA).[57] More significantly, the Court cited the ADA requirement that an individual's request for an accommodation be individually evaluated. The Court found that Martin expended more energy with a cart, which still required twenty-five percent of the walking, than nondisabled golfers expend in walking the whole course. Thus his performance in the fundamental activity of shot-making was not unfairly improved by the accommodation.[58]

II. The Reach of the Court's Opinion

The Court recalled the purpose of the ADA to remedy circumstances of people with disabilities who are isolated by intentional or negligent discrimination, and bring them into the economic and social mainstream of American life.[59] A number of aspects of the decision serve to clarify the extent of ADA coverage of sports participation.

A. The definition of a public accommodation should be given broad scope, given the language of the statute and regulations.[60]

Martin initially argued alternatively for claims under Title I and Title III, but the argument received little discussion because the relationship of professional golfers to the PGA is that of independent contractors.[61] However, the result was not necessarily clear from the facts, and a contrary argument, at least theoretically, could have carried the day.[62] Relationships other than that of employer and employee have been considered sufficient for Title I causes of action provided the plaintiff undergo exclusion or discriminatory treatment similar to that which might result from employment discrimination.[63] The courts might have considered the fact that Martin's income, if any, would come from the PGA's prize money, and that he had to appear at the appointed times and work (i.e., play golf) in order to generate income. Indeed, the viabil-

57. *See generally supra* note 29.

58. *Martin*, 121 S. Ct. at 1897 (citing *Martin*, 994 F. Supp. at 1252).

59. *Id.* at 1889 (citing 42 U.S.C. §§ 12101(a)(2) –(3); S. Rep. No. 101-116, at 20 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332).

60. 28 C.F.R. § 36.104.

61. *Martin*, 121 S. Ct. at 1891 nn.26-28.

62. It appears that Justice Scalia in his dissent (with Justice Thomas) would have considered Martin an employee of the PGA, when he asserts that tournament qualifications are meant to "hire" golfers for PGA tournaments.

63. *See, e.g.*, Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler's Ass'n, 37 F.3d 12 (1st Cir. 1994) (holding that an employee health benefits plan covering the owner and president of a company was subject to Title I though no employment relationship existed, because the plan has the sort of control over benefits usually held by an employer).

ity of Martin's Title III claim does not close the door on Title I claims by athletes with different arguments and different relationships.

An excellent reason to avoid Title I in *Martin* is the Equal Employment Opportunity Commission (EEOC) regulation view of the range of jobs available to a prospective plaintiff which provides that a person is substantially limited in the activity of work if significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.[64] Under this standard, Casey Martin might be considered qualified for many jobs that do not require any significant walking, and might be readily hireable when taking into account the specific factors the EEOC would consider.[65] Even if he were considered only for golf-related work, because of his training, he might be qualified for teaching, writing, or sportscasting, and so forth.[66]

Perhaps the most interesting aspect of this characterization is its endorsement of a somewhat expansive concept of a public accommodation. The circuit courts are split on whether a public accommodation must be a physical place to be modified and "accessed" by persons with disabilities, or whether any "place" where business is transacted can be a public accommodation that may require modification under the ADA.[67] Clearly, the *Martin* opinion relies on the list of categories of public ac-

64. 29 C.F.R. § 1630.2(j)(3)(i).

65. *Id.* § 1630.2(j)(3)(ii). Another reason to allow Martin to continue is the investment he has already made to participate in the Tour. In employment qualification contexts, courts have expressed concern for the plaintiff who has invested personally and professionally in order to qualify for a position only to be defeated by the final qualification barriers. Professional exams, including bar exams and medical boards are good examples. *See, e.g.*, Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094 (S.D.N.Y. 1997) (allowing plaintiff Bartlett to qualify for admission to the bar though she is apparently unable to read well enough to pass the test, because she "struggled through laborious years of law school – at no small fiscal or psychic cost." *Id.* at 1124.).

66. *But see*, Waterstone, *supra* note 29, at 1548 (asserting that an athlete who is being discriminated against may have no other viable career options because often athletes have no competing employers to who they can offer their skills and receive accommodation for their handicap).

67. *See, e.g., Carparts Distrib. Ctr., Inc.*, 37 F.3d 12 (holding that public accommodations are not limited to actual physical structures, and that a health benefits plan offered through a trade association may be subject to Title III); *contra* Parker v. Metropolitan Life Ins. Co, 121 F.3d 1006 (6th Cir. 1997) (holding that a public accommodation must be a physical place, and therefore a employee long-term disability plan was not covered under Title III). Interestingly, Sixth Circuit Chief Judge Boyce F. Martin dissented on *Parker*, asserting that the majority misconstrued *Stoutenborough v. National Football League*, 59 F.3d 580 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995), written by Martin, in which the court held that the conditions of broadcast of an National Football League (NFL) game could not serve to subject the NFL to a claim under Title III. He asserts that the intent was to confine the choices of public accommo-

commodations,[68] as required by the statute, but suggests that the list will be interpreted to include a broad spectrum of sites where commercial activity is transacted.

B. Sports even at the highest professional level are not so selective that the ADA cannot apply.

The Court extends the reach of the ADA to professional sports rather than endorsing the idea that such activity requires a level of skill or such selectivity that some sports organizations might be exempt. The *Martin* facts underscore the law's application to professional tournaments, since only tournament play was subject to a no-cart restriction. The Court clearly rejects the idea that identifying the healthiest, strongest and generally most capable competitor is the purpose of any specific sport. Rather, the sport is likely to be defined by its existing rules in order to identify by competition the person most capable at the specific activities fundamental to that sport.

The Court confirms the need to comply with all the ADA requirements at the highest level of the sport, calling for engaging in an evaluation of the individual's ability to fulfill the fundamental or essential requirements of the sport, unless the law recognizes a reason the evalua-

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dations to the list provided in the statute, but that the list itself leaves the possibility of claims against private places doing business with the public which are not physical places.

68. 28 C.F.R. § 36.104. The list includes:

(1) An inn, hotel, motel, or other place of lodging;
(2) A restaurant, bar, or other establishment serving food or drink;
(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(4) An auditorium, convention center, lecture hall, or other place of public gathering;
(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(7) A terminal, depot, or other station used for specified public transportation;
(8) A museum, library, gallery, or other place of public display or collection;
(9) A park, zoo, amusement park, or other place of recreation;
(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(11) A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(12) A gymnasium, health spa, bowling alley, golf course or other place of exercise or recreation.

Id.

tion is too burdensome.[69] The possibility that individual assessment itself is too burdensome apparently would require a defendant to show very onerous circumstances, and perhaps that such evaluation is impossible.[70]

C. Fundamental rules of a sport are derived most reliably from written rules that apply to all. Unwritten but widely observed rules and rules that are not uniformly applied may then be persuasive.

In order to determine what is fundamental to golf, the Court looked first to the "Rules of Golf," jointly written by the USGA and the Royal and Ancient Golf Club of Scotland, which apply to professionals and amateurs.[71] The Rules provide that players may at times be required to walk, but give no instruction as to why this might be invoked.[72] The Court next reviewed the written rules for PGA professional tours,[73] which require walking the course during tournaments. Exceptions are provided, however, for the Senior Tour of players fifty and older.[74] Finally, the Court reviewed the written notices issued to competitions in particular tournaments, which authorize the use of carts when there is unusual distance between a green and the next tee.[75]

The Court finds in the Rules of Golf the fundamental activities of "using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible."[76] It finds, however, that the walking requirement, which is absent from the two principal sets of rules and is "buried in an appendix to the Rules of Golf," is not fundamental.[77] Further, it is not fundamental to tournament play, since the

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69. *But see*, Waterstone, *supra* note 29, at 1526-29 (arguing that the Court provided no clear rule for distinguishing whether an individual assessment must always be conducted, and asserting that rules of sport exist that are fundamental for all participants and therefore can end the inquiry without need for individual analysis).

70. The only language in Title III that relates to the standards for an individual analysis appear in 28 C.F.R. § 36.208. This section defines "Direct Threat," as one that must be determined by individual assessment "based on reasonable judgment that relies on . . . the best available objective evidence, to ascertain . . . whether reasonable modifications of policies, practices, or procedures will [solve the problem]." *Id.* Thus, an individual evaluation of a person with a disability will be based on the best available objective evidence regarding the nature of the person's capabilities, the essential activities the person wishes to engage in, and the effectiveness and burden of the accommodations sought.

71. *Martin*, 121 S. Ct. at 1884.

72. *Id.* at 1885.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Martin*, 121 S. Ct. at 1893-94.

77. *Id.* at 1895.

PGA allows carts to be used at its discretion in any tour, and routinely allows carts in Senior PGA Tour tournaments.[78]

The Court then considers some implied rules or elements of the game according to the PGA Tour, including the organizers' intention that all golfers tee off and play the course "under exactly the same conditions"[79] and that the walking requirement exists in order to include in tournament play the element of player fatigue.[80] The evidence included detailed, conflicting testimony and statistical evidence of player choices,[81] and finds that the use of the cart does not reliably provide an advantage to a golfer. Further, golfers reported that their ability to place their shots is improved if they are aware of air and ground conditions through walking, and the fact that more golfers walked than rode when the option was available.

The use of the written rules might be considered a lawyerly emphasis, or overemphasis, inappropriate to sport. On the other hand, the rules are considered in the context of evidence of intention, ongoing practice, and a general perception about what is important about the game. The *Martin* opinion also suggests that fundamental activities are those that result in winning, or scoring, i.e., the skills that make a good competitor, rather than skills that merely enhance the organization, pace or management of the game or competition.

D. Appropriate judicial scrutiny extends to a detailed examination of the facts underlying the legal determination, given the ADA requirement of individual assessment of the qualifications of the individual and an interactive process between the public accommodation and the qualified individual with a disability to determine any appropriate reasonable accommodation.[82]

The section above shows the careful scrutiny the courts used to consider rules and facts that might clarify the appropriate resolution of Martin's ADA claim. The scrutiny the courts will apply to sports rules is perhaps the most significant factor in determining which rules are fundamental to the sport, since the issue will arise when a prospective compet-

78. *Id.*

79. *Id.* (citing RULES OF GOLF, *supra* note 49, at App. 192)

80. *Id.*

81. The district court's selection of the observation that walking a golf course, about five miles, expends only about 500 calories (less than a Big Mac), *Martin*, 121 S. Ct. at 1896, must be viewed as evidence regarding fatigue with some skepticism. And, indeed, the Court pursues the other elements of fatigue, including stress and dehydration because of heat. *Id.*

82. The interactive process is found in 29 C.F.R. § 1630.2(o)(3).

itor seeks accommodation from a resistant sports organization which by its nature holds the authority to speak for the sport and its rules. The rules are scrutinized by the court for their impact on the disabled athlete, not left to the discretion of the defendant and rulemaking organization.

The process includes tradition along with other values of inclusion and accommodation in accord with the spirit of the ADA. It is in sharp contrast to the *Olinger* opinion, which endorses maintaining the sport as it has always been played, a process that might approve the very discrimination by intent or neglect that the ADA is intended to remedy. The result may be seen as comparable to allowing an employer to exclude blacks, Jews, or women from certain levels or types of employment because the employer, the coworkers, or the customers might be uncomfortable, inconvenienced, or hostile. To allow such a response trivializes the complaint and the differences between participation and exclusion. Refusing to apply the ADA to sports rules carefully and thoughtfully implies, finally, that sports competition is not very important.

E. A highly capable athlete may nevertheless be a person with a disability under the ADA.

In its *Martin* decision, the Court maintained its insistence, established in the year 2000 employment decisions, that an ADA plaintiff must be substantially impaired in a major life activity *with* the use or existence of mitigating measures. Casey Martin's Klippel-Trenaunay-Weber syndrome has atrophied his right leg, impairs the flow of blood back to his heart, and causes severe pain and anxiety about the risks of hemorrhaging, developing blood clots, and fracturing his tibia.[83]

This, in itself, represents substantial impairment under the ADA. Clearly, any athlete with a claim under the ADA must be substantially impaired in a major life activity and yet be capable of performing at the required level of competing with non-disabled competitors, with or without reasonable accommodation.

Reasonable accommodation or modification also is limited under the law. As applied to practices and procedures, a reasonable modification must 1) make participation or benefit available to the person with a disability, and 2) cause no fundamental alteration. Thus, the cart gives Casey Martin the opportunity, but has not assured that he competes successfully. As applied to "auxiliary aids and services" (including equipment or interpreters), an accommodation can be neither a fundamental

83. *Martin*, 121 S. Ct. at 1885-86.

alteration nor be an undue burden in expense to the public accommodation. Thus, if neither the golf course where a tournament takes place nor the PGA have carts, it is less likely the PGA can be required to provide carts to qualified people with disabilities because of the costs of acquisition and transport.

Interestingly, an eligibility rule that tends to exclude a qualified person by reason of disability or prevent any person or class of people from full and equal enjoyment, is prohibited discrimination unless it is necessary in order to provide the "goods, services, facilities, privileges, advantages or accommodations being offered."[84] Typically, the assertion that such a rule is "necessary" relies on the safety of participants in the mainstream competition or the sheer impossibility of participation by people with a specific disability unless a separate and modified competition is established.

The extent of the accommodation was limited, according to the Court, in that the accommodation cannot confer an advantage on the person with a disability,[85] nor can a change in rules or conditions provide an advantage to all without (apparently) being a fundamental change in the game.[86] However, given the requirement of individual assessment, the standard seems to require identifying an accommodation that is believed to have the correct effect. If such a determination can be made, it must be made, not only when it is "easy."[87]

F. The Impact of Casey Martin on the ADA

The ADA requires not only that people with disabilities have the opportunity to engage in a particular activity, be it employment, jury duty, travel or recreation, but also to engage in the activity with people who are not disabled. Statutory and case law that have dealt clearly with such issues involve street paving and curbcuts that allow people using wheelchairs to utilize the sidewalks and the streets,[88] and seating in theaters and stadiums that must be dispersed to allow people with disabilities to

84. *Id.* at 1889 (citing 12 U.S.C. § 12182(a)).

85. *Id.* at 1887-88 (citing *Martin*, 994 F. Supp. at 1251-52).

86. *Id.* at 1897.

87. *Id.* at 1898 n.53.

88. *See, e.g.*, Kinney v. Yerusalem, 9 F.3d 1067 (3d Cir. 1993) (requiring the city of Philadelphia to provide sidewalk curbcuts when a street is repaved, because the street and curb are unified as interdependent facilities).

sit with their companions and get a ticket at their preferred ticket price, unless such a dispersal of seating simply is not feasible.[89]

The idea that sports are exempt from such requirements is advanced in large part with the justification that sports are different from other endeavors because of their elite nature, the purpose of which is to identify those who are physically most accomplished. The Court requires that the purposes of the sport must be more narrowly or explicitly defined. It deals with the legal argument that the PGA Tour is a private club by recognizing that any person who can show that he (women are not eligible) can play golf at a certain level of skill in the context of the qualifying events (which are costly in entry fees, living expenses and time) by recognizing that the purpose of the Tour is to make money for the Tour. In these two senses, the PGA Tour differs radically in its attributes from a private club, its membership and purposes.

Much more can be said about the intent to exclude certain persons because of their commonly held and involuntary attributes, however.[90] Many aspects of sports receive public funds, through subsidies, community development, or support of education, or through public contributions for the building and infrastructure of facilities and their environs. Recipients of federal funds must comply with Title II of the ADA or with section 504 of the Rehabilitation Act of 1974, which also prohibit discrimination on the basis of disability. Many sports teams and organizations are employers of their athletes, and have no exemption from ADA Title I prohibitions on discrimination. Thus, if an organization such as the PGA Tour can carve out an exemption, it sets itself against the prevailing norm for sports generally.

In the context of civil rights legislation from which the ADA sprang,[91] an argument for exclusion must be suspect, and finally, must be allowed very sparingly. And, if some types of sports or sports organizations are to be exempted from anti-discrimination legislation, it is ac-

89. *See, e.g.*, Fiedler v. American Multi-Cinema, Inc. 871 F. Supp. 35 (D.D.C. 1994) *cert. denied sub nom.* Hoskins v. Kinney, 511 U.S. 1033 (1994).

90. The Supreme Court has held that developmentally disabled persons are not a suspect class and no heightened scrutiny is required for such chronically disabled people under the Constitution. The sources of antidiscrimination law are statutory. *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); *see also* Alexander v. Choate, 469 U.S. 287 (1985) (holding that a reduction in benefits that is neutral on its face and does not arise from discriminatory motive, yet has a disparate impact on a higher proportion of persons with chronic disabilities than others, is acceptable under section 504 of the Rehabilitation Act, the predecessor of the ADA which applies only to recipients of federal funds).

91. *See infra* notes 92-112 and accompanying text.

ceptable to society to give an exemption only if those sports are not very important to society.

III. Civil Rights Legislation and Its Offspring, the ADA

The ADA has its origins in the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, religion and national origin, and, by amendment, discrimination because of sex.[92] Though sometimes controversial, the civil rights legislation has been widely enforced in the courts and has changed the values of society. The federal legislation prohibiting discrimination against people with disabilities is the Rehabilitation Act of 1973.[93] The scope of the Act, a compromise with advocates for broader protection of individuals with disabilities, is limited to federal agencies,[94] federal contractors receiving substantial funds,[95] and entities receiving federal grants or participating in federal programs.[96] The Rehabilitation Act has provided a basis for important litigation establishing the rights of people with disabilities to work, travel and participate in government programs and civic activities. The Act and its regulations provide many of the concepts and definitions later incorporated into the ADA.[97]

Yet, there is broad agreement that the implementation of the ADA is encountering complexities and impediments absent under the prior laws. Employers and public accommodations voice their dissatisfaction with their assigned roles.[98] Even the courts seem to be willing to bend the law to avoid the full implementation of the ADA's provisions, as the Supreme Court is criticized for doing in its year 2000 employment

92. 42 U.S.C. § 2000a(a).

93. 29 U.S.C. §§ 706, 791–795 (1994). The legislation originally used the term "handicap," but was amended to use the preferred term "disability."

94. *Id.* § 791.

95. § 793.

96. § 794.

97. *See, e.g.*, 29 U.S.C. § 706(8)(A) (defining "'individual with a disability' [as] any individual who (i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment"); 34 C.F.R. § 104.3(j)-(k) (regulating entities participating in federal grants and programs pursuant to 29 U.S.C. § 794 (commonly referred to as section 504) and defining "physical or mental impairment," "major life activities," "has a record of such an impairment," "is regarded as having an impairment" and "qualified handicapped person"). Prohibited discrimination is defined at length in 29 C.F.R. § 104.4.

Regulations for section 504 are found in various sections of the Code of Federal Regulations because several agencies have jurisdiction over funds allocated for various purposes.

98. With regard to sports, *see, e.g.*, *Capital Gang*, *supra* note 12 ("The Americans With Disabilities Act is such a muddle. . . . It has been so abused . . . by alcoholics, agoraphobics, and those are just the A's. . . .Congress really ought to tighten it up.").

cases.[99] Advocates for professional sports are only the latest of the contentious chorus.

One apparent reason for the broad unrest arises from the political presentation that enacted the ADA. Legislators and the public concentrated on Title I, envisioning the ADA as helping people with serious physical disabilities who were unemployed because of prejudice or the lack of modest matters of reasonable accommodation. The burden of accommodation could be justified politically by the purpose of making unemployed and isolated persons into competent, self-supporting workers. Yet, the disabilities most frequent among ADA plaintiffs are back problems and mental health conditions, rather than disabilities with more objectively ascertainable symptoms such as, say, paraplegia. Further, most Title I claims are brought by individuals who have jobs and seek accommodations over the resistance of their employers, so the employer experiences a cost without any measurable benefit such as finding a new competent employee. This begins to account for the hostility to Casey Martin's case, even while there is much sympathy for Martin the disabled golfer.

The analysis can be further developed. Professor Ruth Colker conducted an extensive review of district court files of ADA cases.[100] She found that over ninety-three of ADA cases are decided for the defendant,[101] a finding that differs significantly from a tally of Rehabilitation Act results, despite the similarity of the laws. Colker asserts that the courts seem to be quick to dismiss the plaintiff with summary judgment, "ignoring elementary principles of who bears the burden of proof."[102] The decisions for summary judgment in the district courts do in fact seem poorly connected with the factual bases even as they are described by courts in their opinions.[103] Colker theorizes that district courts are unwilling to send ADA cases to juries, choosing instead to find no genu-

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99. Barnes, *supra* note 17 (manuscript at 21-24, on file with author) (discussing Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc, 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999)).

100. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999) (asserting that federal courts are unprincipled in their use of summary judgments and disregard of EEOC regulations, to the disadvantage of ADA plaintiffs).

101. *Id.* at 109 (stating that defendants prevail in over 93% of ADA claims, based on substantial research by the author).

102. *Id.* at 102.

103. This author finds that students are often confused about the fact patterns summarized in their casebooks, which follow a remarkable pattern: Summary judgment for the defendant in the district court; affirmed by the court of appeals.

ine issue of material fact, and decide the case as though the questions were entirely questions of law.[104]

Other researchers suggest a possible reason for the courts' treatment of the ADA, and reason for disapproval among some media commentators and members of the public who have only a sketchy sense of the requirements of the law. Researchers Issacharoff and Nelson observe that the ADA is a potent tool for the redistribution of wealth and opportunity. Its effects are far greater, they argue, than the Civil Rights Act, or even the Age Discrimination in Employment Act.[105] They assert that the ADA's redistributive effects are overwhelming the justifications for enacting the law, and that the "inherent uncertainty in the obligation to provide 'reasonable accommodation'"[106] creates for courts a reluctance to follow the implications of the statute and regulations because the underlying theory allocating costs to the employer is novel and unexplained.[107]

The Civil Rights Act and amendments operate differently in that the Act creates no independent measure of how much redistribution is appropriate, in that any redistribution of wealth results from a judgment finding unlawful discrimination.[108] That is, under older civil rights legislation, a successful plaintiff is fully qualified for the benefit or role sought; the only barrier is the defendant's unreasonable and unlawful discrimination. The defendant must compensate the plaintiff for this wrong.

ADA cases go beyond the finding of discriminatory motive or effect and require redistribution of wealth by requiring that the defendant pro-

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104. Colker, *supra* note 100, at 110-27. *See also* LAURA F. ROTHSTEIN, DISABILITY LAW 239-81 (2d ed. 1998) (giving a series of cases illustrating the provision and denial of accommodations). The great majority (seven of ten) are decided on summary judgment at the district court level, affirmed by the circuit court. The exceptions are brought under the Rehabilitation Act. Two of the cases present facts that weigh heavily against the plaintiffs, both of whom have bipolar illness and seek positions that are very sensitive and potentially dangerous to themselves or others, yet the courts carefully examine the question of any reasonable accommodation that might enable the plaintiffs to fill the jobs they seek. The courts' careful scrutiny of the facts in the distinguishing factor; with better facts, ADA cases nevertheless receive short shrift.

105. Samuel Issacharoff & Justin Nelson, *Discrimination With a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?,* 79 N.C. L. REV. 307, 340-41 (2001). The theory resonates with Colker's concern to create awareness that ADA litigation is erroneously characterized as a source of riches for plaintiffs. That is, employers and the public perceive the ADA as a tool for employees and applicants to harass and bully others into providing special treatment.

106. *Id.* at 310.

107. *Id.*

108. *Id.*

vide accommodation to the plaintiff.[109] Thus, if an employer erroneously refused to reach agreement with an employee who is a person with a disability, with regard to changes in work schedule, workplace barriers or equipment, or other aspects of work that a court determines would allow an employee to work and would not unduly burden the employer and the employer's organization,[110] the employer is either compelled by injunction to make accommodation or made to pay damages, or both.[111] Similarly, for public accommodations, failure to provide a requested accommodation might be the basis for liability, though it may not be clear whether the accommodation is reasonable.

Yet, the reasoning does not well support objections to suits like Casey Martin's. He is a person with an objectively identifiable disability with measurable and severe symptoms. Accommodation costs essentially nothing, particularly given the resources of the PGA. Relatively few others are likely to be at once substantially disabled and qualified to play on the professional tour, as shown by the failure of both Martin and Olinger to maintain their eligibility.

The apparent reasons for resentment of Casey Martin's ADA claim run deeper into ideology. Casey Martin's resolve to play professional golf has grown, by means of his ADA claim, to stand for a transfer of resources from the property holder or public collective to an individual because of need. Though Martin is not provided assistance that does more than level the playing field, conservative observers see only that he has received some benefit not given to others. This double vision of the nature of the accommodation – objectionable in principle though it allows participation – reminds us that the ADA is a civil rights statute that prohibits the continuation of discrimination against an identifiable group, no less than is the Civil Rights Act of 1964.[112]

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109. The classic civil rights discrimination case is similar to the relatively rare ADA claim that an individual has a record of being a person with a disability or is regarded as being a person with a disability. Unlike more typical ADA plaintiffs, those with such claims do not need accommodation. Rather, like plaintiffs bringing race discrimination claims, they only need the discrimination to stop.

110. 29 C.F.R. § 1630.2(o).

111. Under the ADA, it would appear, the "regarded as" and "record of" prongs of the definition of "person with a disability" are more similar to the simple, prejudice-based case of employment discrimination. 42 U.S.C. § 12102. Curiously, cases on these bases are relatively rare, and seem to cause considerable confusion in the courts.

112. Since Casey Martin's request to the PGA and Ford Olinger's to the USGA, another golf participant has been denied the use of a cart in a curious USGA decision. Lee Penterman, a 38 year-old man with cerebral palsy, sought to caddie for a friend on the U.S. Amateur Public Links Championship. Ira Berkow, *Sports of the Times: The Sticky Wicket of Caddies and Carts*, N.Y. TIMES, July 14, 2001, at D8. Penterman caddied for two rounds in

IV. THE AGING OF BABYBOOMER ATHLETES

The aging revolution has already begun, as the average lifespan at birth rose from forty-nine years in 1900 to seventy years in 1960, and to seventy-nine years by 1997.[113] Life expectancy at retirement age is, of course, still older since premature deaths are eliminated from the calculations. In 1900, persons age sixty-five could expect to live about twelve more years; in 2000, eighteen more years.[114] Perhaps the life expectancy at age eighty-five is most startling. Women who reach age eighty-five can expect to live an average of seven more years, while men live on average about six.[115]

The older population's numbers rose rapidly in the 1970s and 1980s, as a boom in medical technology created an unprecedented cohort of survivors of previously fatal conditions. About thirteen percent of the U.S. population, or thirty-five million people, are over traditional retirement age. At present, while medical effectiveness continues to grow, the growth of the population entering retirement is at a relative lull because few babies were born during the Great Depression and World War II. Beginning in 2010, the first of the babyboomers – those born after the end of World War II and up to around 1964 – will enter their retirement years. The retirement age population will grow rapidly until about 2030, when about seventy million, or one in five people, will be age sixty-five or older.[116] The population of the oldest old, whose very survival suggests they are among the very fit born in their age cohort, will continue to grow in number until 2050. A mere four million (two percent of population) today, those age eighty-five and over likely will number nineteen million (five percent) in 2050.

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which golfer Ben Flam competed successfully. Unable to undertake the third day of exertion, Penterman rejoined Flam for the last two holes because Flam had fallen behind, but Flam was eliminated. *Id.* While it appears that Penterman's presence may have had a positive influence on Flam and his game, there is no suggestion that the use of a cart by Penterman would have had any effect on Flam. The report of his struggle to carry the clubs despite a limp and a gnarled right hand in the heat of San Antonio clearly raises questions about the nature of the USGA's thinking in denying a request that has no apparent impact on the skills of golf.

113. THE FEDERAL INTERAGENCY FORUM ON AGING RELATED STATISTICS, OLDER AMERICANS 2000: KEY INDICATORS OF WELL-BEING 70 (2000) [hereinafter OLDER AMERICANS].

114. *Id.*

115. *Id.*

116. *Id.* at 2.

Due in part to extended old age, aging people are already beginning to think in terms of active retirement. More people are working,[117] and post-career "bridge" jobs between work and retirement are becoming common.[118] Fewer look forward to a fully funded retirement[119] and the Social Security "earnings test," which reduced retirement benefits due to excess earnings, has been eliminated.[120] By choice or by necessity, the future of aging looks busier than did retirement of the past.

A. Aging, Activity and Athletic Interest

Awareness of the benefits of physical activity has already caused older people to become more active. Between 1985 and 1995, the proportion of older people reporting their lifestyle as sedentary dropped from 34% to 28% percent among men and from 44% to 39% among women.[121]

Among currently recognized elderly athletes are an eighty year-old swimmer, who sought treatment after a poor performance in a meet, had a triple bypass, and has returned to her sport;[122] a sixty-eight year-old cyclist who has adult onset type II diabetes that is alleviated by his activities;[123] and a one hundred year-old track and field athlete who began to

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117. Mary Williams Walsh, *Reversing Decades-Long Trend, Americans Retiring Later in Life*, N.Y. TIMES, Feb. 26, 2001, at A1 (The Bureau of Labor Statistics reports that the trend to earlier retirement halted in the mid-1980s and recently reversed.); Alison Barnes, *From the Editor*, 1 ELDER'S ADVISOR, Summer 1999, at iii-iv (citing Employee Benefits Research Institute Issue Brief 206 and a 1998 EBRI survey (Sixty percent of older respondents to 1998 study said that a major reason to remain in the workforce after retirement age was they enjoyment of work, and the desire to stay involved.)).

118. Joseph F. Quinn, *Retirement Patterns and Bridge Jobs in the 1990s*, *in* EMPLOYEE BENEFIT RESEARCH INSTITUTE, Issue Brief No. 206, at 1 (Feb. 1999); Mary Williams Walsh, *No Time to Put Your Feet Up As Retirement Comes in Stages*, N.Y. TIMES, Apr. 15, 2001, at A1.

119. Only an estimated 10% of workers in 2001 are able to take early retirement, because of inadequate pensions and the need for health care coverage. Walsh, *supra* note 117, at A1. A significant factor is the shift of retirement plans from defined benefits to defined contributions. Barnes, *supra* note 117, at iv. In the 1998 EBRI study, 38% of respondents identified the need to earn to make ends meet, while 26% expected to support family members. Quinn, *supra* note 118, at 18.

120. Senior Citizens' Freedom to Work Act of 2000, Publ. L. 106-182, § 2, 114 Stat. 198 (2000).

121. OLDER AMERICANS, *supra* note 113, at 33.

122. *Doris Hicks, 80 Year Old Medalist Swimmer*, AGEVENTURE NEWS SERVICE, *available at* http://www.demko.com/cs001129.htm (last visited Oct. 15, 2001).

123. *68 Year Old Cyclist, Leo Weil: Active Aging Profile*, AGEVENTURE NEWS SERVICE, *available at* http://www.demko.com/cs001017.htm (last visited Oct. 15, 2001).

compete at age ninety-six.[124] All compete in the senior division of their sports, however, and some sports have very restricted divisions based on age, e.g., in golf, the U.S. National Senior Sports Classic VI, age 90-94 division. It is unclear whether an older player could compete out of his or her age group, presumably against persons with a competitive edge due to relative youth.

The effects of increased activity among older people generally are not well understood, but the positive effects of avoiding obesity and maintaining muscle mass and strength are quite well established. The benefits of exercise for the stiff and painful effects of osteoarthritis, for example, have changed traditional advice for persons with this most common affliction of later years.[125]

Popular wisdom, and the proliferation of health clubs beginning in the 1980s, suggests that babyboomers have developed unprecedented fitness habits or efforts into middle age.[126] Yet, without a fully reliable crystal ball, the most telling indicator of future feats by aging athletes is the efforts of disabled athletes to date. A few examples include blind golfers, runners, and climbers,[127] and athletes with loss of mobility including a skier who has lost a leg, a climber with paraplegia who therefore climbs relying only on his arms, and hikers using crutches and wheelchairs.[128] One hundred and three individuals competed in the wheelchair division of the New York City Marathon. Most participate in their sports by cooperating with able-bodied people for guidance and assistance, or in a special division.

However, recent developments suggest the movement of athletes with disabilities into the mainstream of sports events. In 2001, Marla Runyan became the first legally blind track athlete to qualify for the U.S.

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124. *Harding Kneedler, M.D., 100 year old Track and Field Athlete*, AGEVENTURE NEWS SERVICE, *available at* http://www.demko.com/cs00130.htm (last visited Oct. 15, 2001).

125. Nicholas A. DiNubile, *Exercise for Osteoarthritis*, *in* PHYSICIAN AND SPORTSMEDICINE, July 1997, at 47, 47.

126. Indeed, the culture of the babyboomers' old age may differ more radically from the past than the popular literature posits. Scholars discuss the arrival of a revision of the very concept of the physical body beginning in the late 20th century, noting that fixed roles within the life course have become blurred into a more fluid whole of life in which one's chronological age and activities may no longer conform to traditional expectations. It is asserted that inner body asceticism may no longer be incompatible with outer body hedonism. Thomas J. Csordas, *Introduction: The body as representation and being-in-the-world*, *in* EMBODIMENT AND EXPERIENCE 1, 2 (Thomas J. Csordas, ed., 1994).

127. Renee Tawa, *Disabled Athletes Determined to Raise the Bar*, L. A. TIMES, June 11, 2001, § 5, at 1. One of the athletes described in the article, Erik Weihenmayer, also skydives and scuba dives.

128. *Id.*

Olympic Team. Diana Golden, an amputee due to cancer, is the first disabled skier to regularly compete in nondisabled events. Two hundred runners from a group for runners with disabilities participated with the mainstream of runners in the 2000 New York City Marathon, and routinely participate in other mainstream events.

While the stories are in themselves inspiring, these athletes' activities are subject to criticism for incurring cost and forcing change similar to the commentary on the *Martin* decision. Hikers on the Appalachian Trail endure criticism for the cost of their 4.6 mile hike to a cabin adapted for accessibility.[129] The costs were estimated at thirty to fifty thousand dollars, and the team, which included a majority of able-bodied hikers, took twelve hours to cover a trail that ordinarily takes four or five hours.[130] Blind runners and climbers typically require the assistance of non-disabled companions working closely with them. The reaction of opponents seems to be based in the question "If this requires so much of so many, why not do something else?" The question ignores the drive that animates many athletes with disabilities.

Many are moderate in their goals, asserting that they have no desire to go beyond the mainstream of recreational athletes.[131] This may be viewed as a form of evolving political correctness a mere decade after the enactment of the ADA. An instructive analogy can be drawn with the evolution of accommodation and mainstreaming in education. With the passage of the Individuals with Disabilities Education Act in the late 1970s, federal funds and a mandate for inclusion were directed to public primary education, creating a group of students with learning and other disabilities (and parents of those students) who expected accommodation and knew how such measures might be implemented. In the mid-1990s, these students began to appear in colleges and universities in numbers and to require the accommodations that had facilitated their education in primary and secondary schools. The number of discrimination claims against universities jumped, though the law requiring accommodation had been in effect since 1974.[132]

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129. *Id.*

130. *Id.*

131. *Id.* (Blind runner simply does not want to be confined to Braille marked trails, or indoors). The director of public education of the National Federation of the Blind believes the examples of elite blind athletes illustrates the difficulty of daily life for the blind, rather than inspiring others to pursue elite mainstream sports. *Id.*

132. Virtually all colleges and universities are subject to the Rehabilitation Act of 1974, because some part of the school or the students receives federal assistance. In the Civil Rights Restoration Act of 1987, Congress clarified that all parts of a higher education institution are subject to the Rehabilitation Act if any part of the institution receives federal funds. 20

Similarly, athletes with disabilities are now and will continue to show how they can participate in the mainstream. Many will be younger than the babyboomers, who will discern their similar interests only as the impairments of aging threaten to exclude them from their sports. Over the next decade, the numbers of exceptional athletes will continue to grow, and the expectation that people with disabilities often can compensate for the typical human capabilities they lack and excel at specialized physical skills, is gaining a public face.

B. The ADA and the Aged Athlete

The ADA's protection is limited to those with chronic, rather than acute and curable conditions.[133] Chronic health conditions are those caused by some type of disease or trauma and not subject to cure. Rather, the debilitating, often progressive, symptoms of such a condition might be treated for better short- or long-term function. Thus, an individual denied employment or access to services because of a broken leg does not have a claim under the ADA, while a person with an atrophied leg, like Casey Martin, does.

All individuals suffer from some chronic health conditions, although among younger people the symptoms often have not reached a threshold level of detectability or limitation of function that causes complaint or at least recognition. Common chronic conditions include arthritis, diabetes, cancer, high blood pressure, and heart disease.[134]

Some chronic conditions are the result of survival of traumatic difficulties. Younger people more often suffer traumatic injury, resulting in loss of major organs or limbs. With improvements in medical technology, including trauma intervention and maintenance of individuals with chronic disabilities, those individuals with compromising conditions are more likely to live to old age.

U.S.C. § 1681 (1994 & Supp. V 1999). The ADA also applies to higher education, with Title II generally covering public institutions and Title III, private institutions.

133. 42 U.S.C. § 12102.

134. 29 C.F.R. § 1630.2(h)

> *Physical or mental impairment* means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id.

While some conditions clearly arise from disease, others might be natural conditions of aging by a healthy individual.[135] For example, the range of hearing pitch typically narrows with age beginning in childhood.[136] Similarly, the onset of farsightedness after age forty is considered an unavoidable result of healthy aging, perhaps a chronic condition.[137] In contrast, many impairments seem to be caused by progressive diseases, including impairments of vision, hearing, nonspecific pain, and paralysis of extremities. For example, a study of cardiovascular health in a group of elderly people showed that about a third had clinically detectable symptoms of disease, one third had subclinical indications that disease existed, and one third had no symptoms.[138]

Clearly, chronic conditions that rise in incidence in the population with advancing age can cause substantial impairment in major life activity, sufficient for a claim under the ADA. However, it may be difficult to determine whether a persistent condition in an older person is the result of disease, age, or a combination of the two.[139] Further, there is no formula for determining when debility due to decades of sedentary lifestyle, alcohol use, and overweight is more likely a chronic disease condition or simply a bad habit with physical consequences. While it is

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135. Sharon A. Jackson, *The Epidemiology of Aging*, *in* PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY 203, 203 (William R. Hazzard et al., eds. 4th ed. 1999).

136. In one study, 411 of 1000 aged white individuals and 252 of 1000 blacks had hearing deficiencies. *Id.* at 207

137. *See, e.g.*, Thomas S. Rees et al., *Auditory and Vestibular Dysfunction*, *in* PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY, *supra* note 135, at 617, 631 (stating that loss of hearing ability is widespread among older people, and the etiology of age related hearing dysfunction is frequently difficult to determine); Robert E. Kalina, *Aging and Visual Function*, *in* PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY, *supra* note 135, at 603, 603 (noting that many changes in vision in later life are universal, inevitable, and currently untreatable).

138. Jackson, *supra* note 135, at 218.

139. Robert S. Schwartz & David M. Buchner, *Exercise in the Elderly: Physiologic and Functional Effects*, *in* PRINCIPLES OF GERIATRIC MEDICINE AND GERONTOLOGY, *supra* note 135, at 143, 143-48 (stating that changes that have been noted with advancing years include loss of endurance (about 1% per year between the ages of 30 and 70); loss of cardiovascular fitness resulting in symptoms similar to hypertension, probably due to increasing stiffness in veins and arteries; and decrease in strength and power (at an average 1-2% per year between the ages of 30 and 79, and possibly doubling beyond age 70)). Originally believed to be inevitable, the reasons for these changes are now in doubt primarily because it is difficult to separate them from the effects of changes in activity over decades. Also, researchers no longer believe there is a limit on the effects achievable through training to a previously sedentary individual, regardless of age. Training elders for physical fitness has shown that changes in their muscle size yields greater changes in strength than in younger adults. Finally, the results suggest the importance of a factor that is well known to athletes: the importance of neural function, the mental component of performance. *Id.* at 149.

tempting to say that the more severe impairments of function are probably associated with disease, even that assertion might be debated for the growing population of centenarians who experience a range of conditions we do not yet consider to be a symptom of any specific disease.

It is unclear whether the differences between conditions due to healthy aging can create a cause of action under the ADA. The EEOC regulations on employment discrimination suggest that any substantially impairing condition might be sufficient, since an individual is considered to be substantially impaired in the major life activity of working if he or she is significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to *the average person* having comparable training, skills, and abilities.[140] However, the Supreme Court in employment cases has denied the validity of agency interpretation of the definition of disability because it appears first in a section of the statute that precedes Titles I through III.[141] The Court therefore has decided it does not need to give any deference to the agencies charged with drafting regulations for each Title.[142]

Thus, at present we can only observe that there exists (now and most likely in the future) some population of aging people who have chronic conditions (i.e., disease caused symptoms) that substantially impair them in major life activities (of "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").[143] An individual need not be impaired in the sport he or she wishes to pursue; rather, the requirement of substantial impairment is a threshold question that must be answered in the affirmative in order to trigger the protection of the statute. The elder plaintiff under the ADA must be a person with a disability, substantially impaired in a major life activity; must be otherwise qualified to compete (by fulfilling steps to be considered as a participant, for example);[144] and must be seeking some accommodation or consideration for accommodations that would allow qualifying and competition on a "level playing field" with non-disabled competitors. The accommodation cannot be an undue burden or hardship for the sports organization, and the plaintiff cannot pose a direct

140. 29 C.F.R. § 1630.2(j).

141. 42 U.S.C. § 12102.

142. Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).

143. *See, e.g.*, 29 C.F.R. § 1630.2(i). The major life activities are the same for each Title of the ADA.

144. A plaintiff need not, however, fulfill such administrative requirements if doing so clearly would be futile. Rendon v. Florida, 930 F. Supp. 601 (S.D. Fla. 1996).

threat to the health or safety of others when considered individually based on recent information and the best objective information.

V. The Future of Accommodation in Sports

Martin opens the door, but does not provide a map for the evolution of sports toward reasonable accommodation. Yet, there are some developments that might be anticipated by reviewing some of the rules and circumstances of sports. It is well worthwhile, considering the extraordinary effort and skills of those who can compete as qualified people with disabilities in the mainstream of sports and a concern for the importance and integrity of sport.

The following addition to the discussion of this article is not intended to explore all the nuances of the rules of the games discussed, but merely to observe the values and reasoning of the courts and some sports. It does not propose that the courts necessarily would decide in favor of changes resisted by defendant sports organizations. Rather, it explores the possibilities to which the Supreme Court might have opened a door to various means of accommodation to assure equal participation in many sports by persons with disabilities. To the possible accommodations suggested below, many could add others that might be made by their own sports.

A. Sports and Unequal Competitors

A number of sports deem that equal circumstances among the players are not key to the competition by engaging in handicapping. A handicap generically is the practice, in a race or contest, of imposing an artificial disadvantage on a supposedly superior contestant, or an artificial advantage on one supposedly inferior, in order to equalize the chances of winning.[145] The assessment of the capability of a player usually is based on the player's record at similar competition. The purpose, it might be inferred, is to recognize the inherent inequality of all competitors, to allow for interesting and challenging competition in which the outcome is in doubt, and to see who has the better day, round, or race.

Golf, with its handicapping formula, is a sport that officially recognizes, and institutionalizes, the calculation of handicaps. In USGA handicapping, for example, "a player's handicap is determined by a formula that takes into account the average score in the [ten] best of the golfer's [twenty] most recent rounds, the difficulty of the different

145. Merriam-Webster's Collegiate Dictionary 526 (10th ed. 1998).

courses played, and whether or not the round was a tournament."[146] Bowling also bases handicap on scoring experience.

Handicapping can be more complicated, taking into account factors only suggested by the requirements of the competition. Sailing, for example, utilizes handicaps to equalize competition between boats of differing specifications. By handicapping intended to equalize the boats, the sport rules imply that the sailing crew is being tested against the elements to determine whether the crew singly and collectively is having the better day at their sport. Thus, the boat is just equipment like a golf club or a baseball bat, and its speed can be factored out of the race by the handicap. An inference to be drawn is that the sailors' greatest challenges are the weather and the sea, and themselves. Though more complex in its calculation, the handicap is considered to be a standard under which the participants must compete. A similar inference might be drawn regarding the golfer and the course at the very time of play, the conditions and the state of mind being the greatest challenges to success.

Each of these sports seeks to determine who is showing the greater concentration and skill given their own resources. A revision of thinking about handicapping, broadening the concept to recognize accommodations that have already been made or may be made for players with disabilities, is a significant step in the reasoned application of the ADA. The following subparts of this article consider aspects of sports rules that accommodate unequal competitors, applying the terms of the ADA to actions that have been or might be taken to allow direct competition. Not incidentally, the discussion includes instances in which the traditionalism of sports precludes routine competition.

1. Divisions of Unequal Competitors

The ADA requires that a qualified athlete with a disability be allowed to compete with other athletes.[147] That is, the rules of eligibility must not tend to exclude the competitor unless necessary.[148] No analysis exists clarifying what is necessary in order to justify establishment of a separate division.[149] Rather, the existence of some categories, such as gender-based and age-based divisions, have been assumed to be appro-

146. *Martin*, 121 S. Ct. at 1897 n.44.

147. 42 U.S.C. § 12182(b)(1)(A)(iii).

148. *Id.* § 12182(b)(1)(C)).

149. *But see, e.g.*, Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 846 F. Supp. 986 (S.D. Fla. 1994) (holding under Title II of the ADA that a city program that has a goal of recreational services to groups with differing abilities, but experiences severe funding cuts cannot cut only higher cost services to persons with disabilities). Rather,

priate and, perhaps, better for the presumptively less capable participants.[150] A separate division for persons of similar disabilities might be created, like the wheelchair division of a marathon.[151]

Yet, with time and experience, the likely disadvantage of one group with regard to the other group, can be calculated in a manner upon which an entire sport relies. For example, a prevalent handicapping system establishes differences in the competition as played by men or by women.[152] Again, golf provides an example. In addition to the handicap calculation, golf provides different tee boxes for men and women.[153] The women's tee typically requires several fewer yards on the first shot to reach a similar lie for the ball. One typically asks no further questions about the nature of the adjustment, since it is widely understood as a generalization that a male athlete of equal age and training with a female athlete will have greater upper body strength and hit farther.

Yet, despite both golf handicaps and separate tees, the men's and women's divisions remain separate.[154] The reasons relate to tradition and certain prejudices in favor of males who traditionally had the funds and leisure for golfing in an economically and racially highly stratified society.[155] It is, of course, possible that the continuing divides relate not to individual preferences, but to a triumph of tradition over declared

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the city must, with public participation, seek an equitable distribution of cuts to the program. *Id.* at 991-92.

150. The phenomenon of the Senior Olympics is well established, and has thousands of participants. *About the NSGA*, NATIONAL SENIOR GAMES ASSOCIATION, available at http://www.nsga.com. Similarly, the Special Olympics provides games exclusively for persons with developmental disabilities. *Oath, Mission & Philosophy*, SPECIAL OLYMPICS, *available at* http://www.specialolympics.org/about_special_olympics/about_soi.html.

151. Although originally advanced as a separation necessary to the safety of all participants, the "wheelchair division" is perhaps better justified by the fact that the fundamental activity of the traditional marathon is running.

152. This article does not intend any inference that femaleness in itself is a physical or mental disability. Perhaps the better view is that many or most sports were made up by men, and are therefore poorly adapted to the greater strengths of the female population. In any case, no conclusion such as female inferiority is intended.

153. And, where applicable, for championship golfers, a difference that might add extra hazard or other difficulty.

154. However, a made-for-TV sports event with pairs of the best male and female golfers was aired on July 30, 2001. Tiger Woods and Annika Sorenstam played David Duval and Karrie Webb. Charles McGrath, *Mixed Greens: Why Don't Men and Women Play Golf Together?*, N.Y. TIMES, July 29, 2001 (Magazine), at 16. Woods and Sorenstam won.

155. *Id.* (noting that women experience much unfavorable treatment in golf that is not warranted by differences in the quality of play).

values associated with other activities in society. Nevertheless, golf provides the way for persons of unequal capability to play together.[156]

Other types of equalizing have appeared in other sports. In team sports that includes inter-gender competition such as soccer, for example, where male and female players must alternate shots in order to provide a fair competition between the teams with opportunity for participation by all players.

2. Auxiliary Aids and Services

The ADA requires that auxiliary aids and services be provided to a qualified person with a disability[157] provided it is neither a fundamental change to the activity nor an undue burden.

A review of disabled athletes in competition suggests that the assistance of a person is often an important component to compensate for a disability. Blind runners, for example, listen to sighted runners who describe the course and footing over the distance of the race. Blind climbers listen to the observations of sighted climbers and may follow the sound of a bell to indicate the area of terrain to follow. Blind golfers utilize the instructions of sighted assistants. All these examples of human assistance have been included by the organizers of sport. This author would assert that the accommodation has been largely noncontroversial because it is believed that the words of an assistant cannot possibly approach the value of precision of sight when making a golf shot, running a trail, or climbing a mountain.[158]

A potentially more controversial use of auxiliary services is in cueing the athlete. A simple example is the deaf runner poised at the start of the race, who cannot hear the gun. The athlete seeks an accommodation to participate in the race. There is little doubt that such an accommodation must exist, since the mechanics of the start have little bearing finally on the running of the course, and because a starting sign that is as pre-

156. *Id.* (asserting that golf as no other game provides the calculations for men and women to compete, and observing that they very rarely do).

157. 42 U.S.C. § 12182(b)(2)(A)(iii).

158. The difference between direct competition and such endurance sports as climbing is recognized. One reason to include them here is the suggestion sometimes made that the achievements of an athlete with a disability should be recorded with an asterisk, presumably with notation regarding the type of assistance that compensated for the disability.

This controversy is being played out in matters of academic and professional testing, where accommodations of extra time or assistance is frequently given to learning disabled or sensory disabled students. If the accommodation is indeed calculated to "level the playing field," it appears that any notation regarding accommodation does a disservice to the person with a disability and to the validity of the calculation of the accommodation.

cise and instantaneous as the starting sound is easy to imagine, whether it be the flash of a light or a tap on the shoulder.[159]

More complex and controversial is the accommodation of a deaf athlete, usually because the complexity of the information or the delivery suggests the possibility of providing some suggestion of advantage. For example, the deaf football quarterback must receive visual signals, either within the helmet devices or from the sidelines, to know the play. Typically, such communication can be generated by a sign language interpreter (or the input of a transcribing program) for a coach's instructions. The precise effects of such an accommodation are not known,[160] yet it seems that the means of communication could be devised to duplicate the aural instructions the player ordinarily would receive.

An interesting question of auxiliary aid and fundamental skills involves a young Florida golfer who was barred from local competition because autism prevented him from keeping his own score.[161] The USGA disagreed, saying that while keeping one's score is important, it is appropriate for others to help a golfer with such a disability keep his score.[162] The ruling suggests that golf is fundamentally a physical undertaking and, if the game goes well enough, questions about the player's mental or emotional perceptions are irrelevant.

The question of auxiliary aids, i.e., equipment and non-human assistance, to accommodate a person with a disability, has been accepted in many forms in many sports. For a runner's lost leg, for example, there has been to date no challenge to the use of a prosthesis in running or skiing. These athletes are neither diverted to a separate event nor required to participate without the aid.

Yet, in golf, one who uses non-conforming equipment cannot post a handicap that would enable the player to move up in the ranks. Baseball players in the major leagues would be prevented, under current rules, from using metal bats, rather than wood, though metal can be used in lower levels of competition.

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159. It is useful to ask Waterstone's questions here: Is this (i.e., hearing) something the athlete trains to do? Is it something a person in the general population can do? Waterstone, *supra* note 29, at 1534. Since the answer is clearly negative, the method of starting the race is simply a functional matter.

160. A question may be raised about whether the deaf player has an advantage during stressful moments because he is not distracted by the noise and excitement of the crowd, but, of course, that does not determine whether the accommodation is reasonable.

161. Bob Buttitta, *Child with Autism Adds Twist to Debate*, VENTURA COUNTY STAR, July 15, 2001, at C13.

162. *Id.*

Explanation of the difference between what is allowed by the sport and what is rejected has been attempted by the current disability advocacy community: "It may be bio-mechanically impossible for a disabled person to perform the same kind of movement patterns."[163] To some extent the characterization is correct, but it is ignored when the "bio-mechanical movement" is clearly more difficult, such as running on an artificial leg.[164]

B. *When* are *Arbitrary Rules Fundamental?*

Commentators speak with dread of the extension of accommodation thinking to giving a hypothetical disabled runner or swimmer a head start to compensate for, say, slowed reflexes or arthritic joints.[165] The reasons offered are, however, elusive. Finally, it appears that the difficulty in definition is a disagreement regarding the nature of fundamentality.[166] Some would assert that rules that are quite arbitrary but fundamental include the height of the hoops in basketball and the distance between the bases.[167] Yet, the theory seems as unsuccessful as the

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163. Tawa, *supra* note 127, § 5, at 1 (quoting Doug Pringle, executive director of Disabled Sports USA – Far West).

164. Clearly, artificial legs that include powered assistance to the athlete's efforts are beyond the scope of this article. Sports must screen for such devices, as they do for drugs and hormones that enhance trained performance.

165. DiNubile, *Exercise for Osteoarthritis*, *in* PHYSICIAN AND SPORTSMEDICINE, *supra* note 125, at 47 (noting that revised medical opinion regarding the common impairment of old age, osteoarthritis, calls for regular exercise preferably avoiding stress on weightbearing joints). Swimming is such an exercise.

166. Waterstone, *supra* note 29, at 1534. In pursuing the distinction between fundamentality and reasonable accommodation, Waterstone poses the following questions:

> (1) Does the Rule involve a skill that an athlete in the particular sport trains to do? (2) Is this particular skill unique to an athlete in the sport, or is it a task that the general population can perform? (3) What is the link between success in the skill the rule tests for and success in the sport? (4) Would the rule modification place other athletes at a competitive disadvantage? (5) Why does the league have this rule? (6) Would the rule modification change the way the game is played for all participants? (7) What is the realistic administrative and financial burden on the association in determining whether or not to waive this rule on a case-by-case basis?

Id. While this author does not endorse the answer to these questions, however interrelated and overlapping, as the correct answer to the question of fundamentality, the questions nevertheless shed much light on the matter.

167. *Id.* at 1537 (seeking to identify "a bedrock tenet of the game," and asserting that certain rules have no impressive explanation but that should not degrade their importance). In Parent, *supra* note 28, at 135, PGA Tour Commissioner Tim Finchem is quoted from a Feb. 2, 1998 press conference regarding the differences between tournament and recreational golf: "Could we envision in any sport different rules for different players? If there is anything fundamental about athletic sport it is that you have the same rules for all the competitors. You bring your physical attributes and I bring my physical attributes to the playing field or the

Supreme Court's in providing a guide about which rules fall in that category[168] because it leaves a wide range of rules that might be based on negligent discrimination, a harm that the ADA specifically prohibits.

An alternative view of such "rules of the road"[169] is that changing a rule for a player with a disability cannot change the game for players without disabilities without making a fundamental change in the game. Thus, the example of the height impaired basketball player[170] who seeks accommodation in the form of moving the line for a three point shot closer to the basket seems at first look to be non-fundamental because another line can designate where players of ordinary height stand to make their free throws.[171] In contrast, a three-point shooter using a wheelchair would not have a right to such accommodation.[172] Though such a player could have exclusive use of the special line if it equalized the amount of skill needed to shoot from a chair, the game nevertheless would be fundamentally changed because the defense would need very different strategies to proceed with the game.

Using such reasoning, it appears that there are likely to be more fundamental rules for team sports than for sports in which the principal competition is against one's own perceptive and physical limitations. Certain sports presented as direct competition, however, might be better viewed in this context as independent competition. This probably includes racing sports in which the competitors primarily race the clock, despite the fact that the events of starting and finishing draw great interest from spectators. The argument that motivation requires that all runners start from the same point does not stand, considering that races conducted on an oval track can have staggered start lines and races often are run in heats.[173]

Timing is an important aspect of sport, and while changes to timing might be considered to be fundamental to the game, not all timing must be so. Many aspects of sports are carefully timed for reasons relating to

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oval track or the ski slope or the football field or the baseball field, and we play by the same set of rules."

168. Waterstone, *supra* note 29, at 1537.

169. *Id.*

170. Note, however, that the height-impaired basketball player is not substantially impaired in a major life activity (unless perhaps suffering from some serious condition attributable to severely impaired growth), and thus in reality has no claim under the ADA.

171. Waterstone, *supra* note 29, at 1538.

172. Feinstein, *supra* note 14, at 13A.

173. One might even argue that the sixty-second clock is not fundamental, since a simple accommodation for the slowed capabilities of aged, disabled racers could be a slower clock to equalize the opportunity to compete with athletes in their prime.

the flow of play for the media or other factors. An example is the ten-second clock for a basketball free throw.[174] If, because of slowed reflexes or other disability, a player can shoot only with a twelve- or fifteen-second clock, it is difficult to argue that the change would fundamentally change the game.[175] The accumulation of seconds affects both teams equally in terms of rest and recovery; strategy is not significantly affected.

An example raised in the media as a potential accommodation that might be imposed by the ADA is the designated hitter rule,[176] which allows teams in the American League to have a player who does not play a field position, but only hits and runs the bases. The rule allows a team to keep a valuable player whose hand/eye coordination still allows a competitive hit, though running speed and other fielding skills are diminished by age.[177] The existence of the rule in the American League might suggest that hitting and pitching are fundamental to baseball but fielding is not. That conclusion is not unavoidable, however, since there is no requirement that National League baseball and American League baseball share the same fundamental rules, as do the PGA Tour and USGA.

Thus, the American League and National League with regard to this requirement play different games. Or, perhaps an additional factor relevant to the fundamentality of a rule is whether the player eliminated from competition because of lack of accommodation has another employer or employers who can provide comparable opportunities for play.

VI. Conclusion

Sports are about who is the better player, and competition between players hones the skill of the competitor and the achievement represented by the sport. All competitors differ, in dimensions, strength, endurance, concentration, strategic thinking, and team-enhancing ability. Those who assert that the purpose is competition of course are correct.

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174. Waterstone, *supra* note 29, at 1535; *Capital Gang*, *supra* note 12 ("[S]ports rules are arbitrary. Why three bases? Why three strikes? Why the height of the basketball hoop?"). Some advocates for the independence of sports argue simply that the rules are arbitrary, i.e., of concern to no one but those who organize the sport. However, professional sports – most likely to argue for exemption – are also big business, and business clearly is subject to antidiscrimination law because issues of employment and entertainment and role models are critically important to society.

175. Waterstone, *supra* note 29, at 1535.

176. Broder, *supra* note 11, at 3.

177. *Id.*

Those who assert that the purpose is inclusion, competing together as well as against one another, also are correct.[178]

Sports enthusiasts who oppose accommodation for qualified athletes with disabilities are not just choosing whether sports are primarily performance or participation. They are defining performance very narrowly. Indeed, one might consider the push for exclusion at its most extreme, by rules that prevent athletes from utilizing any modern aid: no lenses, a simple diet, and herbal remedies.

Resistance to accommodation is about mistrust of authority, which ultimately must impose a solution. It is more likely that devotees of a sport will accept the decision of the sports organization that traditionally sets the rules, but as the designated hitter rules shows, that is no guarantee of acceptance.

With regard to the coming elder athletes, sports like golf that involve extended periods of light exercise and have a very significant mental component, are most likely to attract numbers of older sports enthusiasts as competitors. Further, if an equalizing strategy already is implemented without legal compulsion, it is more likely to be inferred that similar or related changes are not fundamental to the sports activity.

Athletes with disabilities will be competitors, and not all will seek special divisions for their competition. As Trey Holland, USGA President cryptically said: "I believe this human endeavor will be what defines the fact of the USGA over the next ten to twenty years." So, also, for all sports.

178. Jim Abbott, *Sports are a Way of Belonging*, N.Y. TIMES, Feb. 5, 2001, at A27 (acknowledging love of golf and its respect for rules and etiquette; asserting that the beauty of golf lies in the fact that it is a game the player plays against himself, and that the sport has a right to enforce its own rules; but asserting that excluding a person because of a permanent disability is no benefit to the game).